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Steven Chester, Director  
Department of Environmental Quality  
Constitution Hall, 6<sup>th</sup> Floor South  
P.O. Box 30473  
Lansing, Michigan 48909-7973

April 30, 2007

Dear Steve,

The enclosed report is my final assessment of the occurrences leading to documents not being included on the DEQ website for the Kennecott Eagle Mine application process. There are several Appendices listed which I have not included, as they have been collated in Lansing and can be incorporated at the end of my report for added clarification.

I believe this fulfills the obligations under my contract. I have enjoyed working with DEQ on this project, and hope issues will be resolved satisfactorily. If you have questions regarding my report, please do not hesitate to call me.

A handwritten signature in cursive script that reads "Donald L. Inman".

Donald L. Inman, President  
EcoLogic, Ltd.  
P.O. Box 154  
Millersburg, Mi. 49759

April 30, 2007

## **PROCESS REVIEW: KENNECOTT EAGLE MINE PERMIT APPLICATION**

### **INTRODUCTION:**

The Department of Environmental Quality (DEQ) contracted with me, Donald L. Inman, PhD., EcoLogic Ltd., to review the process used in reviewing the Kennecott Eagle Mine permit application. (See "Contract", Appendix 1) The Kennecott Eagle Mine is proposed to be developed in Michigan's Upper Peninsula, and an application was submitted to the DEQ in February, 2006. As a result of documents that were not posted on the DEQ website for public review, Director Steven Chester, DEQ, stopped the review process in February, 2007, and called for an independent audit of the process and documents. My contract required me to conduct such an audit; and also called for a set of recommendations, if any, by which the process might be improved.

### **METHODOLOGY:**

A Process Review Team was established, which consisted of Jean Stacey, Department of Human Services, Jennie Daniel, DEQ Office of Human Resources, and myself. A set of questions were first developed in a collaborative process, with input from at least two environmental groups, as well as the Process Review Team. (See Questions, Appendix 2) The questions were used to interview all the members of the Mining Review Team, except Kevin Smith of Arcadis Consulting. This was because his input to the Mining Review Team consisted of what would be an appropriate amount of mine reclamation dollars, or other post mining activity; and this was not part of the Process Review Team charge. (See State of Michigan Part 632 Rules, Mining Application Review Team, Appendix 3) Although each Process Review Team member participated in the interviews, the conclusions drawn here are mine. In addition to members of the Mining Review Team, we interviewed other personnel as deemed necessary to understand how the process unfolded. (See List of Interviewees, Appendix 4) Interviews were conducted principally by telephone conference; but some were interviewed in person. Those interviewed in person included Mr. Joe Maki, Mr. Harold Fitch, Mr. Steven Wilson, Mr. Skip Pruss, and Mr. Steven Chester. The List of Interviewees identifies each person and his or her role in the Mine Application Review process. The Process Review Team requested an interview with Mr. Jack Wittman, but conditions unacceptable to us were put on such an interview; so none occurred.

Documents received by the Process Review Team on the Kennecott Eagle Mine are included in Appendix 5, Kennecott Eagle Mine Documents.

The Process Review Team felt it was important to maintain flexibility in interviews. If the response to a question generated another question, follow up questions could be asked by any team member at any time. I believe this provided opportunities to gather more information than would have been possible with more rigidity. Often, the original set of questions did not necessarily fit for some of the technical people, and additional questions were generated as the interview progressed. Interviews were completed, depending upon availability of the personnel. As additional knowledge was gained during the process, interviews with people not originally scheduled were also conducted, as well as second interviews with some people who had already been interviewed.

#### FINDINGS:

All interviewees were extremely helpful, and mostly open and forthright during the interview process. Most had a genuine desire to see this controversy regarding documents which were not available, resolved as soon as possible. Such resolution would allow them to go forward with their responsibilities on the Eagle Mine Application. This was especially true of the DEQ Executive Office and staff on the Mining Review Team. The DEQ members of the Mining Review Team who worked in the Upper Peninsula were dismayed by the level of controversy and public ill will expressed by some, about them during the review process. This public hostility was apparently particularly prevalent after February, 2007, when interest groups discovered that three documents written by Dr. David Sainsbury, Consultant for Itasca, were not placed on the DEQ website. The National Wildlife Federation (NWF) iterated during a February, 2007 meeting with Director Chester, that the documents were not included on the DEQ website. This announcement led DEQ Director Chester to halt the mine application review process, and create an independent review of the process. MFG was a consultant to DEQ on the application; and Dr. Sainsbury was a subcontractor to MFG. The three documents were a May 4, 2006 twenty four page detailed geo-technical draft report on crown pillar issues, a May 5, 2006 final edited version of the May 4, 2006 report, and a May 22, 2006 executive summary of the May 5, 2006 document. The documents were critical of the Kennecott mining application regarding the crown pillar and the methodologies used for assessing its stability. The technical aspects of these documents are beyond the scope of this review. The fact that these three documents were not posted on the public DEQ website was viewed, by some interest groups and individuals, as the DEQ dealing in bad faith. The contents of the documents were discussed by Dr. Sainsbury with Dr. Jack Wittman, a consultant for NWF, in October, 2006. However, their absence from the DEQ website was not revealed by NWF until February, 2007.

The contract between Dr. Sainsbury and the primary consultant for DEQ on crown pillar subsidence, that is MFG, requires a written release from MFG for Dr. Sainsbury to release documents to third parties. No written release was given. The primary objective for me was to understand how and why these three documents were not listed on the DEQ website in May, 2006. They have subsequently been listed as of February, 2007.

The interviews revealed the following observations:

1. The Kennecott Eagle Mine application was variously described as 7000 to 8000 pages, a lengthy and complex document. The application was received by DEQ approximately three weeks after new rules for Part 632 had been approved by the Michigan Legislature, giving scant time to develop written procedures for the Mining Application Review Team to process the permit. At the same time, Part 632 Rules required DEQ to process the permit application under specific timelines which may have been too short, given that no experience had been gained, nor procedures developed for processing applications under the new Statute and Rules.

2. Although procedures had not been developed, Mr. Maki created the Mining Application Review Team from his understanding that a multi-disciplinary review team would be necessary. He discussed the May 4, 2006 Sainsbury Draft document, without naming the document, with one of the Mining Application Review Team members to determine if that member's expertise was sufficient to review and comment on Sainsbury's analysis of crown pillars. Because such expertise did not exist within the DEQ, Mr. Maki sought out consultants for this review process as well. He sent the May 4, 2006 document back to MFG. Mr. Maki informed MFG that the document was too technical to utilize; and asked them to require a summary from their sub-contractor, which resulted in the draft May 22, 2006 summary. He took on the responsibilities as coordinator of the team without a specific assignment from supervisors. The lack of written procedures for both establishing the Mining Application Review Team, and the timing and methods for communications caused some Mining Application Review Team members to be unsure of how and when to communicate their concerns. Much, but not all of the interaction between Mining Review Team members and Mr. Maki was verbal; and no minutes were written during meetings.

3. There were very different methods for permit reviews among various divisions as well as the DNR represented on the Mining Review Team. This led to varied expectations during the process. Some members worked in Divisions where permits were issued only after all issues were resolved. However, Part 632 requires a draft, which provides the opportunity for further changes before a final permit is public noticed. Also, DNR Mining Review Team members were required by DNR management to send their comments to Lansing for a total DNR response, which did not arrive at DEQ until January 5, 2007. In spite of this late response, verbal communications generally identified DNR member issues to the Mining Application Review Team.

4. There was not a common understanding of, and very little training in the FOIA statute and process by Mr. Maki and staff responding to FOIA. This was especially true regarding what could or could not be released to the public. Secretaries without any formal training were in charge of FOIA requests in the Gwinn DEQ office. Mr. Maki took on the responsibility of document processing and FOIA responses, believing it was his duty to perform these functions as coordinator of the Mining Review Team. Although Mr. Maki received the May 4, 2006 Draft Sainsbury document and the draft May 22, 2006 executive summary, he does not recall receiving the May 5, 2006 final document. None of the FOIA coordinators knew of these three documents, until they

were posted on the DEQ website in February 2007. Because Mr. Maki believed that Dr. Sainsbury's documents were draft, and used in a deliberative process to arrive at a final agency decision (the June 21, 2006 DEQ letter of deficiencies to Kennecott), he determined the documents were not subject to disclosure under FOIA. He did not consult others in this decision. E-mails generated by the Mining Application Review Team were treated similarly based on his understanding of FOIA; that is, they are deliberative documents leading to a final agency decision, and therefore were not posted on the DEQ website.

5. Some sectors of the public interest groups believed, and continued to tell Mr. Pruss that the iterative process for permit review should not be used. They apparently believed that Kennecott should not be allowed to continually improve their application through an iterative process; but instead, that a final letter of comment or deficiencies should be sent to the applicant for their complete response. Mr. Pruss related to Mr. Maki that a final letter should be sent to Kennecott. As a result of Mr. Maki's understanding of the change from an iterative process to one in which the Mining Review Team deliberates and makes conclusions about any remaining deficiencies, Mr. Maki prepared and sent the June 21, 2006 letter of 91 deficiencies to Kennecott. The letter includes all comments from the Mining Review Team. The letter also includes all comments from Dr. Sainsbury's May 22, 2006 executive summary. Mr. Maki and Mr. Fitch prepared the List of Draft Conditions for the Draft Permit dated February 23, 2007 which encompassed concerns iterated in the Sainsbury documents. Dr. Sainsbury confirmed in a letter dated November 9, 2006 to several people including MFG and Mr. Maki, that the conditions in the draft permit would address his concerns. Dr. Sainsbury reiterated this in a letter to Mr. Fitch dated March 2, 2007. However, some Mining Application Review Team members still have some concerns regarding the Draft Permit Conditions that need to be addressed before a final permit is ever issued.

6. Golder Associates Ltd, consultants for Kennecott, have significant disagreements over technical conclusions of Dr. Sainsbury, which they iterated to him in written analyses, both dated April 25, 2006 identified as technical memoranda and at least two telephone conversations in July, 2006. Golder Associates Ltd. also disagrees with the affidavit of Dr. Jack Wittman, consultant for NWF, dated March 27, 2007, and is preparing their own response.

## CONCLUSIONS:

Mr. Maki is a confident, take charge type of person. He is a person with a significant sense of responsibility, as reflected in his interview responses. "This was my baby" was how he referred to his responsibilities for the Kennecott application. He created the Mining Review Team, seeking experts within and outside the agency for DEQ assistance in the review process. In both the coordinating and FOIA processes, he also related that he did not want to bother his superiors with details, because they also were extremely busy, and had their own contentious and controversial issues.

Mr. Maki was very impressive during the interview, and seemed very honest and persuasive. In addition, he showed a good deal of remorse regarding his disposition of the Sainsbury documents; and in retrospect would have listed them on the DEQ website. In short, he took on the Kennecott review process independently, and with confidence. However, it appeared that he was all but alone in this controversial and complex review process. In the end however, although the Sainsbury documents were not available for public review until February, 2007, all of the issues from the Sainsbury documents were identified in the 91 issue letter to Kennecott dated June 21, 2006, and in the Draft Permit Conditions of January, 2007. Therefore, he used due diligence in utilizing the Sainsbury document to protect the environment.

The remainder of the Mining Review Team also was diligent in ensuring that the review of the permit was complete, and inclusive of their expertise and responsibilities. In fact, the DNR members, although aware that they must send their comments on the permit up the chain of command, additionally either e-mailed or discussed their concerns with Mr. Maki, ensuring that those concerns were either listed in the 91 issue letter of June 21, 2006, or at least known to DEQ.

The two secretaries who were responsible for FOIA in the Gwinn office of DEQ had no formal training in the FOIA statute or processes. They had been instructed by other secretaries who either had been trained, or at least held similar responsibilities for processing FOIA requests. In spite of that, they seemed to understand most of the procedures for FOIA, with the exception of determining what was subject to disclosure and what was not. This determination was directed by both secretaries to technical staff to decide what documents should be released.

The superiors of Mr. Maki spent little time directing his activities as Mining Application Review Team Coordinator, because he very seldom sought direction and input, and because they strongly believe in his capabilities and past experience. Additionally, the time lines set by statute for review, the hectic pace set by the statute and the public controversy added immensely to the Mining Application Review Team workload, especially for Mr. Maki. These facts alone may be the most important reasons that the review process relied to a large extent on verbal responses, was confusing to staff members at times, and that the Sainsbury documents were not initially listed on the DEQ website. In spite of these problems, the process resulted in the full set of questions and concerns being added to the June 21, 2006 DEQ letter of 91 deficiencies sent to Kennecott. The Draft Permit contained almost all team member comments, including all of Dr. Sainsbury's. Some issues expressed by some Mining Review Team members need to be addressed prior to a final permit, if any, is issued.

There was no attempt by anyone interviewed to suppress documents, nor was anyone asked to suppress a document, including Dr. Sainsbury. There was no intentional attempt by anyone to undermine the review process or reverse the full public disclosure practices of DEQ.

RECOMMENDATIONS:

The following recommendations were offered both by the interviewees as well as by the Process Review Team, including me. They are suited for large, complex, multi-permit or multi-agency applications. I believe that to the extent practicable, they should be instituted for the remainder of the Kennecott Eagle Mine Application review process.

1. The DEQ needs to be able to, and is responsible for the public input process. All documents or work products of consultants should be the property of DEQ. Contracts with consultants should be directly with DEQ, as opposed to a contractor sub-contracting to another entity.

2. All multi-disciplinary and/or multi-agency teams should have a complete understanding of the expectations and responsibilities of each member, including the coordinator or chair person. To this end, a written set of procedures should include how and when communications between team members occurs, who handles FOIA requests, and how scheduled meetings will be announced. The procedures should include how the team will be kept apprised of (a) the status of the permit, (b) review team member comments, (c) updates on third party issues such as public hearings, contested cases, and/or lawsuits. Consideration should be given to keeping minutes of review team meetings, or providing a shared drive among team members for continual updates on the review process. Some Mining Application Team members heard developments regarding the application from the news media.

3. The Executive Office of DEQ should name a lead division in writing, so that the Director's management team of Division or Office Chiefs knows who is responsible and accountable for the process and progress of the review team. Once review team members are established, they should be identified in writing by the Executive Office of DEQ.

4. Supervisors of review team members need to be kept better apprised of the activities of any of their staff on a review team. This will serve to increase the accountability of staff, active participation and ownership by supervisors, and build confidence in review team members that their supervisors understand and support their activities. Documents received or generated by the review team should be shared with at least the supervisor of the team chair person, and the lead Division or Office Chief. Minutes, or shared drive updates on permit review progress and process should be shared with all supervisors of the review team members.

5. A Memorandum of Understanding between two or more review team agencies prior to team startup would clear up expectations and communications between agencies.

6. The decision to release or withhold documents or work products developed during the review process should be elevated up the chain of command, or at least shared by the team coordinator with his or her supervisor. Understanding of FOIA by Mining Application Review Team members varied greatly. All documents or work products generated through the review process should be automatically sent to the supervisor of the review team coordinator. One person other than the team coordinator should be

designated as part of the review team to coordinate and collectively respond to all FOIA requests. This person should have formal training in FOIA, and have direct access to the Office of Attorney General for legal advice on FOIA. The concept of a deliberative process versus an iterative process, and how that does or does not affect the public release of documents and work products needs to be better understood by review team members.

7. The technical staff should be buffered from excessive public scrutiny in order to carry out their application review responsibilities effectively. The public scrutiny, controversy and contentiousness of the issue and process weighed heavily on all members of the Mining Application Review Team. Team members are the technical staff responsible for the science involved in the application review process. A different person trained, skilled and experienced in the public interaction process should be designated to chair public meetings, hearings and act as the DEQ's spokesperson for any large, complex, multi-permit project.

8. Following review and consideration of the above recommendations by the Executive Office, I recommend reinstating Mr. Maki in the coordinator position of the Mining Application Review Team. I am convinced that not releasing Dr. Sainsbury's three documents was not done intentionally to mislead the public. In fact, he utilized the documents in the June 21, 2006 letter to Kennecott listing deficiencies in their application. There was not a clear understanding by Mr. Maki, other Mining Application Review Team members, or the secretaries responsible for FOIA in the Gwinn Office, what was subject to disclosure, and what was not. I saw no evidence of any intent by anyone to mislead the public, or shield information from public scrutiny.